

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRAIG KELLY)	
Claimant)	
)	
VS.)	Docket No. 1,046,045
)	
)	
ASSOCIATED WHOLESALE GROCERS INC.)	
Self-Insured Respondent)	

ORDER

Claimant requests review of the October 27, 2009 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

This is the second time this claim has come before the Board. On its first appearance, a single Board Member concluded that claimant had failed to establish a causal connection between his shoulder symptoms and his work activities on May 31, 2009.¹ Thus, the ALJ's conclusion that claimant failed to prove he sustained an accidental injury arising out of his employment was affirmed and benefits were denied.²

However, shortly before the Board's decision on this first preliminary hearing could be rendered, claimant returned to the ALJ and requested another preliminary hearing. In support of his renewed request for benefits, claimant offered his earlier testimony along with a supplemental report from Dr. Zimmerman, a physician who had seen claimant in connection with the first preliminary hearing, as well as a new report authored by Dr. C. Reiff Brown, an orthopaedic physician who had also recently seen claimant.

Following the hearing the ALJ issued his Order denying claimant's request. In doing so, he explained that "[t]he new reports from Dr. Zimmerman and Dr. Brown fail to change

¹ Although the E-1 identifies an accident date of June 1, 2009, claimant verbally amended that date to be May 31, 2009, claimant's last date of work for respondent.

² Board Order, No. 1,046,045, 2009 WL 3710753 (Kan. WCAB Oct. 28, 2009).

the underlying fact that nothing happened at work on May 31, 2009 to injure the claimant's shoulder."³

Claimant has appealed this most recent Order and alleges that the uncontroverted medical reports support his contention that he sustained injury while working on May 31, 2009. Thus, the ALJ's Order should be reversed and he should be granted ongoing medical care with Dr. Sankoorikal.

Respondent contends the ALJ's Order is well reasoned and should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Both the ALJ's Order and the Board's earlier Order succinctly set forth the underlying facts of this claim. As such, they will not be unnecessarily repeated. Suffice it to say, the ALJ denied claimant's request for preliminary benefits because he believed claimant had failed to establish that his shoulder complaints were causally connected to his work activities.

This conclusion stemmed not only from claimant's own testimony, where he described experiencing dizziness while at work but denied any onset of shoulder pain and also based on the fact that the history which claimant provided to Dr. Zimmerman was contrary to claimant's own testimony presented at the preliminary hearing. Simply put, claimant denied any injury, event or immediate onset of pain while working on May 31, 2009. Rather, he testified that his soreness started late in the day with swelling becoming observable the next morning. Yet, when claimant later relayed the history of his alleged injury to Dr. Zimmerman, the doctor recorded a different onset of symptoms:

*Mr. Kelly developed pain and discomfort affecting the left shoulder and the left trapezius musculature in **repetitively lifting and moving merchandize** [sic] in carrying out job duties as an order puller for Associated Wholesale Groceries.*⁴

Elsewhere in his report, Dr. Zimmerman made it clear that he understood claimant's shoulder complaints began *while working* and that he reported those symptoms that day and was sent home. Dr. Zimmerman's report fails to make any mention about the dizziness claimant complained of.

³ ALJ Order (Oct. 27, 2009).

⁴ P.H. Trans. (Oct. 26, 2009), Ex. 3 at 1 (Dr. Zimmerman's IME report dated July 2, 2009).

When faced with this evidence, the ALJ denied claimant's request for benefits finding that claimant had failed to establish that he sustained an accidental injury on May 31, 2009 that bore any relationship to his work activities. That finding was affirmed by a single member of the Board.⁵ That Member⁶ explained:

In short, the history recited by Dr. Zimmerman is not the history related by claimant's testimony. Accordingly, at this juncture the medical evidence fails to link claimant's shoulder symptoms to his work. Claimant's burden of proof is more than a strong suspicion.⁷

In order to cure the evidentiary insufficiencies, the claimant offered a supplemental report from Dr. Zimmerman which, in essence, reaffirms his earlier causation opinion that claimant's work activities caused his shoulder complaints.⁸ He explained that it is "not uncommon medically for an injury affecting a shoulder joint to present with pain and within a few hours, i.e. 8 to 24 hours, for symptoms to intensify."⁹

And in an effort to further bolster his claim claimant offered the report of Dr. Brown, an orthopaedic physician, who had recently examined claimant. Dr. Brown's report reflects the following history:

*On May 31, 2009 while working for Associated Wholesale Groceries it was necessary for him to move boxes of produce weighing between just a few pounds to somewhere around 80 pounds. 40-50 pounds was the average weight of the boxes. In the course of that work activity he became aware that something was not functioning right. **He denies that he had pain or a tearing feeling in the shoulder however he had a feeling of disorientation and he reported this to his supervisor.***¹⁰

When faced with this additional medical testimony, the ALJ again concluded that-

The problem, however, as noted in the previous order, is that there was no injury on May 31, 2009. The claimant experienced dizziness at work, went home due to that condition, and then later noticed pain in the shoulder. There was no evidence

⁵ K.S.A. 2008 Supp. 44-551(i)(2)(A); Board Order 1,046,045, 2009 WL 3710753 (Kan. WCAB Oct. 28, 2009).

⁶ Honorable Kent Wirth.

⁷ Board Order 1,046,045, 2009 WL 3710753 (Kan. WCAB Oct. 28, 2009) at 3-4.

⁸ P.H. Trans. (Oct. 26, 2009), Ex. 2 (Dr. Zimmerman's follow-up report dated Sept. 13, 2009).

⁹ *Id.*

¹⁰ *Id.*, Ex. 1 at 1 (Dr. Brown's IME report dated Sept. 11, 2009).

of a trauma to the shoulder or of gradual onset of shoulder pain in the nature of a repetitive injury.

The new reports from Dr. Zimmerman and Dr. Brown fail to change the underlying fact that nothing happened at work on May 31, 2009 to injure the claimant's shoulder.¹¹

Claimant again appeals the ALJ's Order suggesting that the medical testimony is uncontroverted that claimant's shoulder was injured in an accident while working.

As noted in the Board's earlier Order, the law requires that claimant persuade the trier of facts by a preponderance of the credible evidence that his position on an issue is more probably true than not true.¹² And while the physicians' reports are uncontroverted by other medical testimony, claimant's own testimony controverts the underlying facts upon which those physicians' based their opinions. Claimant *denied* that anything happened while working. He did not describe any accident, injury, or physical impact. All he described was dizziness which led to him being told to go home from work. Only after he went home did he experience any shoulder symptoms.

It is true that both Drs. Zimmerman and Brown have indicated that shoulder symptoms can often be delayed following an injury. But this presupposes an injury - which has yet to be identified. As the ALJ noted, claimant did not testify to a trauma to his shoulder, nor of any gradual onset of shoulder pain while working. All claimant described was a feeling of dizziness.

As was earlier noted, a suspicion of an injury does not satisfy the evidentiary burdens imposed by the Act. Absent evidence of an accident, even the physicians' uncontroverted evidence cannot sustain scrutiny. This Board Member finds the ALJ's Order should be affirmed in every respect.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹³ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

¹¹ ALJ Order (Oct. 27, 2009).

¹² K.S.A. 2008 Supp. 44-508(g).

¹³ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 27, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self -Insured Respondent
Kenneth J. Hursh, Administrative Law Judge